

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

MISC. CRIMINAL APPL. NO.57 OF 2019

MOSES ACHIENG ADHOGA.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

The Applicant, Moses Achieng Adhoga was convicted of two counts of **stealing** contrary to **Section 268(1)** as read with **Section 275** of the **Penal Code**. The particulars of the offence were that on diverse dates between 18th June 2012 and 25th June 2013 at Metal Crown Nairobi within Nairobi County, the Applicant, being a servant of Metal Crown Limited, jointly with others not before court, stole the sum of Kshs.6,330,120/- the property of Metal Crown which came into his possession by virtue of his employment. He was also convicted of **stealing a Barclays Bank cheque leaf** valued at Kshs.100/-. The Applicant was further convicted of the offence of **forgery** contrary to **Section 345** as read with **Section 349** of the **Penal Code**. The particulars of the offence were that on diverse dates between 18th June and 19th December 2012 at Metal Crown Nairobi within Nairobi County, jointly with others not before court, and with the intent to defraud, forged several cheque leaves of various amounts particularized in the charge sheet purporting them to be genuine cheques signed by a director of the company. He was finally convicted of the offence of **attempted stealing by servant** contrary to **Section 281** as read with **Section 389** of the **Penal Code**.

In respect of the 1st count, the Applicant was fined Kshs.1,000,000/- or in default he was to serve two years imprisonment. In respect of the 2nd count, he was fined Kshs.50,000/- or in default four months imprisonment. In respect of the 3rd count, he was fined Kshs.100,000/- or in default one year imprisonment and in respect of the last count he was discharged under **Section 35(1)** of the **Penal Code**. The sentences were meted out on 20th February 2019. The Applicant was unable to pay the fine. He is serving the default sentences.

The Applicant made an application before this court seeking a revision of the default custodial sentences. He pleads with the court to order that the sentences to run concurrently instead consecutively. He was of the view that the sentences and the fines imposed were excessive in the circumstances. He explained that he was a first offender and the sole breadwinner of his sickly parent who was suffering from cancer. He was also taking care of his young family with three children of school going age. He was also providing for his younger siblings who were of school going age. During the hearing of the application, the Applicant further submitted that he had a daughter that was asthmatic. He told the court that he was reformed in the period that he has been in prison. He urged the court to give him a second chance at life.

Ms. Sigei for the State opposed the application. She submitted that the sentence that was imposed on the Applicant fitted the crime. The Applicant had abused the position of trust that his employer had placed on him and stole the amounts that he was entrusted with. She further submitted that the trial court had taken into account the Applicant's mitigation before it reached the decision to sentence the Applicant. The sentence was legal and proper. It should not be interfered with. She however conceded that the trial court did not indicate whether the sentences imposed would run concurrently or consecutively.

When the trial magistrate sentenced the Applicant to serve the custodial sentences, it was exercising judicial discretion. This court can only interfere with such exercise of discretion if it is established, either that the sentence was too harsh or too lenient in the circumstances. The court will also interfere with the imposition of the custodial sentence if it is established that the trial magistrate applied the wrong principles of the law in sentencing the Applicant or that the sentence was illegal. The Court of Appeal in **Ahmad Abolfathi Mohammed & Another – vs- Republic Criminal Appeal No. 135 of 2016** (unreported) held at Page 25 thus:

*“As what is challenged in this appeal regarding sentence is essentially the exercise of discretion, as a principle this Court will normally not interfere with exercise of discretion by the court appealed from unless it is demonstrated that the court acted on wrong principle; ignored material factors; took into account irrelevant considerations; or on the whole that the sentence is manifestly excessive. In **Bernard Kimani Gacheru v. Republic, Cr App No.188 of 2000** this Court stated thus:*

“It is now settled law, following several authorities by this Court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the facts of each case. On appeal, the appellate court will not easily interfere with sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor, or took into account, some wrong material, or acted on a wrong principle. Even if, the Appellate Court feels that the sentence is heavy and that the Appellate Court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, any one of the matters already stated is shown to exist.”

In the present application, it was clear to this court that the trial court did not commit an error of principle or fail to take into consideration a relevant factor when it sentenced the Applicant to serve the sentences that were imposed. As stated above, this court cannot interfere with the

exercise of judicial discretion by a trial court unless it is established that the court either sentenced the Applicant to serve a sentence that was harsh and excessive in the circumstances or that was too lenient as to attract interference by this court. The trial court took into account the serious nature of the charges facing the Applicant. It also considered the Applicant's mitigation. The sentence imposed on the Applicant cannot be said to be harsh or excessive in the circumstances.

In the premises therefore, the Applicant's application lacks merit and is hereby dismissed save that the default sentences imposed on him after failing to pay the fines imposed shall run concurrently instead of consecutively. It is so ordered.

DATED AT NAIROBI THIS 24TH DAY OF SEPTEMBER 2019

L. KIMARU

JUDGE